Filed 4/11/19 P. v. Morrison CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. WARREN OLEG MORRISON, JR. Defendant and Appellant.	A152440 (San Mateo County Super. Ct. No. SF400896A)

Appellant Warren Oleg Morrison, Jr. was tried before a jury and convicted of the first degree murder of Jarmal Magee with an enhancement for personally and intentionally discharging a firearm causing death. (Pen. Code, § 187, subd. (a), 12022.53, subd. (d).)[1] In this appeal from the judgment, appellant contends the trial court erred in giving an unmodified version of CALCRIM No. 522, which allows the jury to consider provocation relevant to the degree of murder. He argues that when combined with CALCRIM No. 570, defining voluntary manslaughter based on provocation, CALCRIM No. 522 deprived him of his right to present a complete defense by erroneously implying that provocation must be objectively reasonable to raise a reasonable doubt as to premeditation and deliberation. We affirm.

[1] Further statutory references are to the Penal Code.

I. BACKGROUND

On October 25, 2015, Michelle Smith had been dating Magee for about three months. She dropped him off in the 300 block of Wisteria in East Palo Alto and went to have dinner with a friend. Smith did not know whether Magee sold drugs, but suspected he did.

Magee phoned Smith later in the evening and she arrived after 9:00 p.m. to pick him up. She parked her car at 343 Wisteria and saw appellant, whom she knew, and Doug Burse, whom she had seen on Wisteria before. Magee walked over to Smith's car and told her that he and the other two men were arguing about where he was from and who had lived in the neighborhood longer. Magee walked across the street to pour himself a cup of cognac and returned to where the men were standing. After a couple of minutes, the argument escalated to yelling about who was from Verbena, a street around the corner.

As they argued, Smith saw appellant throw a punch at Magee, who fell on his back though the punch did not land. Appellant straddled Magee and stood over him. Burse kicked Magee as he lay on the ground. Appellant hit Magee's head as he attempted to hit back. Smith got out of her car and yelled stop.

According to Smith, appellant pulled out a gun from his waistband and fired two rounds at Magee. Magee, who had been hit, got up, and Smith started running toward them out of concern for Magee. Appellant pointed the gun at Smith and Magee pushed Smith down. Smith heard appellant fire two more shots. Magee told Smith to get in the car and as he said this, a bullet went by her head. Smith then heard three shots in quick succession. She started her car and Magee opened the passenger door, but did not get in. Smith drove a few feet, stopped and saw Magee lying on the sidewalk face down. Appellant was standing over him and fired two more shots at his back. Smith got out of the car and appellant ran away. Smith tried unsuccessfully to put Magee in her car and then called 911. She did not see Magee or Burse with a gun that night.

Magee died of multiple gunshot wounds. There were four total, including one independently fatal wound to the upper left back that transected the spinal cord, two

wounds to the back which were very serious and likely to be independently fatal, and one to the groin that was not fatal. At the scene of the shooting, police recovered eight nine-millimeter cartridge casings and an expended nine-millimeter bullet. The eight cartridge casings were all fired from the same gun.

The gunshot detection and location system ShotSpotter was operational in the area. There were four activations of Shotspotter around 9:25 p.m. on October 25, with eight rounds fired over a period of 35 seconds.

Appellant was charged by information with the murder of Magee (count 1) and the attempted murder of Smith (count 2). (§ 187, subd. (a), 664/187, subd. (a).) It was alleged that as to the murder count, appellant personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing death, within the meaning of section 12022.53, subdivisions (b)–(d). It was alleged that as to the attempted murder count, appellant personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c). All but the section 12022.53, subdivision (d) allegation (personally and intentionally discharging a firearm causing death) were dismissed as to the murder count before trial.

After his arrest in this case, appellant's cell phone was searched. In November 2015, appellant visited websites covering news in East Palo Alto, publicizing wanted fugitives, discussing self-defense and reporting the homicide of Magee. The phone history also showed searches for getting away with murder, self-defense in California, crimes in East Palo Alto and appellant's name.

Appellant took the stand at trial. He testified that several people sold marijuana on Wisteria, and Burse, who lived there, was angry at Magee for "short-stopping" people—stopping people from going on to the next person to buy marijuana from that person. A dispute devolved into Magee "talking smack" to appellant and Magee approaching Burse to argue with him about who had been in the area longer. Magee tried to take a swing at appellant and they started wrestling and fell to the ground. Burse tried to intervene at appellant's request.

Magee tried to pull a gun from his waist and he and appellant wrestled for control of it. The gun went off without hitting anyone and appellant and Magee continued to fight over the gun. The gun went off again and either the first or second shot hit Magee in the leg. Appellant ended up with the gun and started shooting. Magee fell to the ground on his stomach and appellant fired three shots, hitting Magee twice. Smith started screaming and appellant ran away. Appellant shot Magee because he was afraid and angry; he threw the gun away in a dumpster in Stockton, where he lived.

The court instructed the jury on first degree premediated murder, second degree murder, voluntary manslaughter based on imperfect self-defense and heat of passion, and justifiable homicide based on perfect self-defense, as well as attempted murder. The jury convicted appellant of first degree murder, found the firearm enhancement to be true, and acquitted appellant of attempted murder. The trial court sentenced appellant to a total prison term of 50 years to life, consisting of 25 years to life for the murder count plus 25 years to life for the firearm enhancement.[2]

II. DISCUSSION

"First degree murder is an unlawful killing with malice aforethought, premeditation, and deliberation. [Citation.] Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life). [Citation.] Second degree murder is an unlawful killing with malice, but without the elements of premeditation and deliberation which elevate the killing to first degree murder. [Citation.] To reduce a murder to second degree murder, premeditation and deliberation may be negated by heat of passion arising from provocation. [Citation.] If the provocation would not cause an average person to experience deadly passion but it

[2] The court later recalled the sentence based on the passage of Senate Bill 620, which amended section 12022.53 to give the court discretion to strike enhancements under that section. It ultimately imposed the same sentence of 50 years to life. A separate appeal, A154092, challenges the sentence imposed on resentencing. We have reversed that order and remanded for resentencing in a separate published opinion filed today. *(People v. Warren Oleg Morrison, Jr.* (April 11, 2019, A154092) ___ Cal.App.5th ___.)

precludes the defendant from subjectively deliberating or premeditating, the crime is second degree murder. [Citation.] If the provocation would cause a reasonable person to react with deadly passion, the defendant is deemed to have acted without malice so as to further reduce the crime to voluntary manslaughter. [Citation.]." (*People v. Hernandez* (2010) 183 Cal.App.4th 1327, 1332 (*Hernandez*).)

The jury was instructed with CALCRIM No. 522: "Provocation may reduce a murder from first degree to second degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also, consider the provocation in deciding whether the defendant committed murder or manslaughter." The jury was also instructed according to CALCRIM No. 570: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. . . .[¶] . . . . [¶] . . . . It is not enough that the defendant was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] . . . . [¶] . . . ."

Appellant argues the jury was not adequately instructed on the subjective provocation that will negate premeditation and deliberation and make a killing second degree murder rather than first degree murder. (See *People v. Jones* (2014) 223 Cal.App.4th 995, 1000–1001 (*Jones*); *Hernandez*, *supra*, 183 Cal.App.4th at

p. 1333.) He argues that because the jurors were (properly) instructed that the provocation necessary to reduce a killing from murder to voluntary manslaughter must be viewed from an objective perspective, and must be sufficient to provoke an ordinary person of average disposition, they would have required the same reasonable person standard for the provocation that reduces a killing to second degree murder, which is actually dependent upon the defendant's subjective mental state, regardless of what a reasonable person would do. (*Ibid*.) We disagree.

CALCRIM No. 522 has been held to adequately explain provocation as a factor affecting the degree of murder. (See *People v. Mayfield* (1997) 14 Cal.4th 668, 767 (*Mayfield*), overruled on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2 [upholding CALJIC No. 8.73, the precursor to CALCRIM No. 522.) An instruction explaining that a subjective rather than an objective test applies to reduce murder from first degree to second degree murder is a pinpoint instruction, and defense counsel's failure to request a pinpoint instruction forfeits the argument. (*Jones*, *supra*, 223 Cal.App.4th at pp. 1001–1002; *Hernandez*, *supra*, 183 CalApp.4th 1334 [failure to request pinpoint instruction on subjective provocation forfeits issue].) Counsel did not object to CALCRIM No. 522. Indeed, he requested that CALCRIM No. 522 be given and did not seek any modification. Appellant has forfeited the issue on appeal.

Moreover, even if the issue were not forfeited, we would reject it on its merits. We review de novo a claim that jury instructions were incorrect or misleading. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. [Citation.] We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions." (*Hernandez*, *supra*, 183 Cal.App.4th at p. 1332.)

Here, there is no reasonable likelihood the jury thought that the provocation which determines whether a murder is of the first or second degree is the same as the provocation required to negate malice and reduce a homicide to voluntary manslaughter.

CALCRIM No. 570, pertaining solely to voluntary manslaughter, properly specifies provocation in that context must be objectively reasonable, in other words, that "a person of average disposition" would have been provoked "in the same situation and knowing the same facts." Read with CALCRIM No. 522, which does not contain any such requirements for provocation reducing a killing to second degree murder, the only reasonable conclusion to be reached is that the provocation precluding a finding of premeditation is something different from (and less than) that which would preclude a finding of malice. That is, the jury necessarily understood that if some provocation exists, the killing must be second degree murder unless it finds the provocation was objectively reasonable under the circumstances. Otherwise, there would be no need to separately instruct the jury to consider provocation in the context of second degree murder as distinct from the provocation that will reduce a killing to voluntary manslaughter. Considering the instructions as a whole, a reasonable juror would have understood that something less than objectively reasonable provocation could preclude a finding of premeditation and justify a verdict of second degree murder. (See *People v. Scott* (1988) 200 Cal.App.3d 1090, 1095 ["[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions"].)

Appellant acknowledges that his challenge to CALCRIM No. 522 is undermined by *Mayfield*, *supra*, 14 Cal.4th at pages 778–779, *Jones*, *supra*, 223 Cal.App.4th at pages 1000 to 1001 and *Hernandez*, *supra*, 183 Cal.App.4th at page 1333. Although he attempts to distinguish these authorities, we are not persuaded.

In *Mayfield*, *supra*, 14 Cal.4th at page 778, the court considered an argument that CALJIC No. 8.73 (the precursor to CALCRIM No. 522) was ambiguous because it did not specify the subjective factors the jury should consider in determining how provocation bears on the elements of first and second degree murder. The court concluded CALJIC No. 8.73 is a pinpoint instruction and the court was under no duty to clarify or amplify it absent a request. (*Ibid.*) Appellant cannot be heard to complain that CALCRIM No. 522 was incomplete.

In *Jones*, *supra*, 223 Cal.App.4th at page 1000 to 1001, the court upheld the very instructions given here, noting that they were correct and that the defendant was seeking a pinpoint instruction to the extent he was arguing they should be more specific. The court noted the result might be different in a case where the prosecution had argued an objective test applied to reduce murder from first to second degree, but there (as in this case) the prosecutor made no such argument.

In *Hernandez*, *supra*, 183 Cal.App.4th at pages 1333, the court rejected a challenge to CALCRIM No. 522 as inadequate because it did not specifically link provocation to the concept of premeditation and deliberation, referring only to first and second degree murder. It noted that a court was not required to instruct on provocation at all, so it was not misleading to instruct that provocation could affect the degree of murder without explicitly saying it could negate premeditation and deliberation. (*Id*. at p. 1334.) It noted that provocation was not used in the instruction in a technical sense peculiar to the law. "[W]e assume the jurors were aware of the common meaning of the term. [Citation.] Provocation means 'something that provokes, arouses, or stimulates'; provoke means 'to arouse to a feeling or action[;]' . . . 'or to incite to anger.' [Citations.].)" The court concluded the jury would have understood from CALCRIM No. 522 as well as CALCRIM No. 521 defining first degree murder (also given here) "that provocation (the arousal of emotions) can give rise to a rash, impulsive decision, and this in turn shows no premeditation and deliberation." (*Hernandez* at p. 1334.)

Appellant also notes that in *Hernandez*, unlike in this case, the jury was not instructed with CALCRIM No. 570, which sets out an objective test for reducing murder to voluntary manslaughter. Appellant suggests the jury in this case was misled by hearing the objective standard, whereby the "defendant is not allowed to set up his own standard of conduct." We disagree. In *People v. Rogers* (2006) 39 Cal.4th 826, the jury was instructed on provocation as it relates to voluntary manslaughter but not provocation as it relates to second degree murder. (*Id*. at pp. 879–882.) On the defendant's claim that the court erred by not instructing on this latter type of provocation sua sponte, the court concluded that the complete omission of such an instruction was not misleading: "[T]he

standard manslaughter instruction is not misleading, because the jury is told that premeditation and deliberation is the factor distinguishing first and second degree murder. Further, the manslaughter instruction does not preclude the defense from arguing that [subjective] provocation played a role in preventing the defendant from premeditating and deliberating; nor does it preclude the jury from giving weight to any evidence of provocation in determining whether premeditation existed." (*Id*. at p. 880.) *Rogers* held the sought-after instruction was a pinpoint instruction that the court did not need to give on its own motion. (*Ibid*.) If it is not misleading to completely omit an instruction on provocation reducing the degree of murder when an instruction on manslaughter is given, it is not misleading to instruct on provocation reducing the degree of murder in addition to the standard instruction on voluntary manslaughter.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

People v. Warren Oleg Morrison, Jr./ A152440